United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4186

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

TWO WHEEL CORP., d/b/a HONDA OF MINEOLA,

Respondent.

IN OPPOSITION TO APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR TWO-WHEEL CORP., d/b/a HONDA OF MINEOLA

GUTTERMAN & POLLACK
Attorneys for Respondent
71 South Central Avenue
Valley Stream, New York 11580
(516) 561-0430

STEWART ALTMAN
Of Counsel

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AUTHORITIES CITED

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Company violated Section 8(a)(3) and (1) of the Act.

2. Whether the Board's use of a bargaining order is the only available effective remedy.

I. STATEMENT OF THE FACTS

Seasonality of Company's Business

The Company is in a seasonal business wherein it principally sells and services Honda Motorcycles. That business can be divided into the following departments: Sales, Parts, Service and Mail Order. The uncontradicted testimony establishes that the business of the Company is an extremely seasonal one and the season has traditionally ended on or about September 1st in one year and did not again pick up until the late winter early spring of the following year (A. 57, 92, 118, 122, 136-137).[1]

A notice was posted by the Company dated July 23, 1974 which contained the clear statement that "continuing employment will be based on seniority, productivity, apptitude, and general attitude" (Respondent's Exhibit No. 8) (A.145). On August 23rd,[2] the Employer Morris Zegarek, via an interoffice memoranda, advised his office personnel that effective "week ending August 30th", they were to put into effect the seasonal layoffs (Respondent's Exhibit No. 9). On August 23rd, the Company terminated one of its employees, Glenn Musano.

Discharge of Musano

Musano was hired by the Company on June 8, 1974 to work in

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[1] "A" references are to the printed appendix filed herein.

[2] All dates are in 1974

the parts department. Musano himself admitted that when he was hired, Morris Zegarek informed him about the seasonality of the business and the necessity for layoffs when the season ended (A. 92).

The Employer, Morris Zegarek testified that the decision to terminate Musano was made approximately one week prior to his discharge (A. 146).

On or about August 21st Musano began soliciting employees to attend a Union organizational meeting scheduled for Friday evening, August 23rd. At the time of Musano's discharge, Morris Zegarek had no knowledge at all as to Musano's Union activities (A. 121, 145, 147) . Musano was discharged for incompetence, lateness, absenteeism, and failure to follow instructions and take orders (A. 146-147). Later that day Musano went to see Zegarek and asked him why he had been discharged. Zegarek replied, "Incompetence" (A. 147). Supervisor Theodore Port testified that he had no conversations with management or Mr. Zegarek concerning this Union or any Union and that he played no role whatsoever in the discharge of Glenn Musano (A. 135). The Administrative Law Judge imputes any knowledge of Union activity to Mr. Zegarek (A. 21, F.N. 13). The Company takes exception to this inference and contends that any such inference has been rebutted by the testimony of the Company's witness.

Union Demand for Recognition

The following Monday, August 26th, two representatives of the Union presented themselves at the Employer's place of business, made an announcement over the loud-speaker and assembled some eight or more employees of the Employer in the retail selling area, at which time they made their demand upon Morris Zegarek, President of the Company, for recognition (A. 41, 44-45, 51, 65).

Mr. Zegarek indicated that at that time he could not recognize the Union and would have to speak with his attorney and other principals of the business (A. 15, 50-51). Attempts by Morris Zegarek to consult with these people at that time proved fruitless and the Union refused to leave unless and until the Company granted them recognition at that instant (A.42, 51).

Employees' Refusal to Work

Mr. Zegarek and his son, also employed by the Company, requested the employees who were milling around during this period to return to work. These requests were made both in general and to specific employees with certain employees being directed to perform specific tasks at that time. All these requests were refused (A. 15, 45).

The employees were advised that if they failed to return to work the Company would clock them out. The employees, at

the direction of the Union refused to work or leave the retail selling area. The Union admits through the testimony of Richard Shirk and Arthur Scott that they were blocking access of customers and that they were staying until they got recognition (A. 42, 51). Mr. Zegarek advised the assembled group that he would be required to summon the police to eject them. After a passage of some time, the police arrived and, at the direction of the Union, those employees concerned left the premises and went outside (A. 51-52, 66-67). The Employer faced with this refusal to work (TR Page 48) immediately went out to advise his customers who had been promised delivery of their vehicles that the same could not be done due to employee work stoppage and advised those customers whose vehicles were operational to pick them up and make arrangements for future service rather than to have their motorcycles awaiting service which could not be performed (TR 426-427). Zegarek was finally able to contact his attorney, David Issacson, who advised that the earliest possible time that he could meet with the Union and Zegarek was Wednesday, August 28th (A. 52).

After an additional passage of time, the Union and the Company made arrangements to meet that Wednesday morning, August 28th, to discuss recognition. The Union requested that the employees who had earlier refused to work be permitted to return. The Company tabled the suggestion until Wednesday morning in view of the fact that Mr. Zegarek had scheduled

a meeting for Wednesday with the Company attorney present. Thereupon, the Employees commenced formal picketing until Wednesday morning when the scheduled meeting took place (A. 15, 42, 53).

The Union Never Established a Majority

The meeting of Wednesday morning is the ledge-pin around which the future conduct of both the Union and Company must be viewed. The Union presented the Company with nine authorization cards (A. 44). The Union correctly took the position that certain employees could not be considered as falling within an appropriate unit and the Company correctly took the position that certain of the card signatories could not be considered within the unit. The Union admitted that they "no longer had a majority" and felt that they "should file for an election", which in fact they did (A. 54-56).

Agreement Reached Between the Union and the Company

What proceeded thereafter is extremely critical in examining the Company's future conduct, the uncontradicted testimony of all witnesses was summarized by Arthur Scott, an officer of the Union, as follows:

> "We were discussing with Mr. Zegarek and his attorney about the men coming back to work and we had an understanding that they would

not be harassed, fired or laid off while this election -- while we were going to file for what was pending and in the event business called for a layoff Mr. Zegarek said that he would lay them off by department and seniority"(A. 59).

The Company's witness unequivocally testified that at the meeting it was stated that the layofis were to begin on September 1st in conformity with the company's usual business practice (A. 16, 122). This testimony was buttressed by the testimony of many of the Board's witnesses (A. 56-57, 118). The testimony of Stewart Lilker, a witness for the Board and an alleged 8(a)(3), clearly summarizes what took place in this regard:

"Mr. Zegarek said at the meeting that normally he begins laying people off on September 1st. He says he does this every year because of the seasonal nature of his business." (A. 118).

After this meeting and after the agreement concerning the election and the layoffs, the striking employees were permitted to return to work until certain of them were notified of their actual layoff in accordance with the understanding reached with the Union on August 28th (A. 69-70, 83, 96-97, 104, 120, 131-132, 149-154). The affected employees were terminated in accordance with seniority and in accordance with the agreement

reached with the Union on August 28th, and their termination was in no way related to their Union activities (A. 154).[3]

Following the layoffs, certain new employees were employed by the Company. The Board contends that these hirings demonstrate the Company's discriminative treatment of the laid-off employees. Nevertheless, a close scrutiny of the uncontradicted testimony offered by Morris Zegarek was to the effect that the new employees did not replace the laid-off employees in that six of the new hires were part time and/or temporary employees and that all possessed requisite qualifications, skills, and backgrounds different from those employees laid off, but necessary to the economics and growth of the business (A. 161-167).

ARGUMENT

I. THE COMPANY DID NOT VIOLATE SECTION 8(a)(3) AND (1) OF THE ACT.

The issue before the Court is whether or not the Company violated the Act when it discharged employees Glenn Musano, Robert Siegfried, David Kocivar, Stewart Lilker, Thomas Dodge, Dario Ardito and Albert Antonson. It is the Company's position

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[3] None of the affected employees who attended the Union meeting had seniority with the exception of Ken Ruppel who was not discharged (A. 107-109).

that the findings and recommendations of the Board and the Administrative Law Judge are not supported by a preponderance of the credible evidence adduced at the hearing and that none of the discharges were motivated by Union animus.

Turning first to Musano, the Company excepts to the findings and recommendations of the Administrative Law Judge and the Board in failing to take cognizance of the fact that by August 23rd the Company's seasonal high was drawing to a close with the resulting necessary reduction in the work force, thereby affording the opportune time for an employee of questionable competence to be terminated. The Board contends that Musano's discharge was because of his Union activities.

Musano himself admitted that when he was hired he was aware of the seasonality of the motorcycle business and the concomitant necessity for layoffs during the slow period (A. 92). The decision to fire Musano was made about one week prior to his discharge and at the time of Musano's actual discharge, Zegarek, the Company President, had no knowledge of any Union activity on the part of Musano or any other employee (A. 145-146).

Zegarek testified that Musano was discharged for incompetence, repeated lateness, absenteeism, refusal to follow instructions and for accident proneness (A. 23, 146). This testimony was uncontradicted yet, the Board incorrectly contends that it lacks merit on the grounds that no other

witness was called upon to corroborate this testimony and that no personnel records or time cards were offered to support the allegations of lateness and absenteeism.

Musano did not deny his lateness, his absenteeism, his failure to follow directions and to take orders or his history for accidents (A. 92). In addition thereto, Zegarek, Isaacson, the Company Attorney, and even one of the Board's own witnesses, Stewart Lilker, is credited with admitting that at the time of Musano's discharge that Zegarek had no knowledge of Musano's Union Activity (A. 121, 145).

The Board contends that the Company did not give any reason to Musano as to why he was being discharged. The Administrative Law Judge and the Board improperly rejected Zegarek's uncontradicted testimony that Musano was discharged for incompetence and found that the circumstances of Musano's termination were as he (Musano) and Dodge testified (A. 14). The Administrative Law Judge and the Board erred in relying in any way whatsoever upon Dodge's testimony for the record is clear that Dodge had no knowledge of any conversation had between Musano and Zegarek and that Dodge was not even present during the conversation between Musano and Zegarek (A. 133).

The inference that Musano's discharge was connected to his Union activities is not based upon a proper interpretation of the facts. The Board's interpretation casts upon the Company a burden to corroborate and permits the General Counsel to cast

and shift upon the Company its burden to prove the alleged unfair labor practice.

There is little doubt that from the inception of Musano's employment that he was aware of the probability of his being laid off in the slow season (A. 92). It therefore follows that Musano, who was hired in June, did not have seniority and would be one of the first employees laid off at the start of the slow season and therefore, it follows that Musano is using his Union adherence as a sword and not a shield. Musano knew that his layoff was imminent, and as a result thereof, he attempted to use the Union's organizational campaign to retain his position although he had no seniority.

The Board states that although Supervisor Wachter witnessed acts of misfeasance on the part of Musano, Wachter was not called to testify. The Board further states that personnel records or time cards were not submitted to support Zegarek's allegations of lateness and absenteeism; however, the uncontradicted testimony of Zegarek in reference to the aforementioned incident still remains. Wachter and any and all personnel records were readily available to the Board by way of subpoena, and the Board chose not to subpoena the same. The Board now contends that the non-production of Mr. Wachter and/or the personnel records should give rise to an unfavorable inference against the Company. It should be noted at this point that the General Counsel had ample opportunity during cross-examination

to question Mr. Zegarek in reference to dates and times of Musano's lateness, absenteeism, and accident proneness: however, General Counsel chose not to do so.

The burden of persuasion in connection with an unfair labor practice charge lies with the Board and never shifts to the Company. For all these reasons, the Court must find that the Company discharged Musano for cause at a time when the Company's seasonal high was drawing to a close and not because of his Union activities and that the Company did not violate Section 8(a)(3) by his discharge. The affect of this discharge will be discussed hereafter.

Seasonal Layoffs

After the August 28th meeting between the Union and the Company and after the agreement concerning the election and the seasonal layoffs, the picketing employees were permitted to return to work and continued to work until certain of them were notified of their actual layoffs.

In most instances, the employer, in advising the affected employees of their layoffs, indicated to them that the layoffs were being implemented in accordance with departmental seniority (A. 96-97, 103, 105-106, 119-120, 131-132). In view of the agreement with the Union, the Company could not shift employees from one department to another as in previous years. Clearly, none of the Company's conduct thus far could

be considered "unfair".

The Board contends that the discharge of the six affected employees was prompted by Union animus, however, one-third of the employees who signed valid Union authorization cards, Ruppel, Steindel and Baldasarra, were not discharged. Each discharged employee was well aware of the seasonality of the motorcycle business and each discharged employee was aware that seasonal layoffs were to commence as of September 1st (A. 122).

It is undisputed that Zegarek informed the Union and each affected employee that seasonal layoffs begin September 1st. The Board improperly contends that the Company's "three to two" formula is a guarantee that all employees who worked through the busy period would be working through the slow period. This interpretation is inconsistent with the testimony of all witnesses, in that since the beginning of the Company's business, there have been seasonal layoffs with the basic crew dropping to ten (10) employees and that these layoffs existed in 1971, 1972 and 1973 although the "three to two" formula existed throughout that period (A. 57, 92, 118, 122, 136).

Among those laid off for lack of work was Dario Ardito. Ardito was the only employee in the Warranty Department. During the last week of August the Company closed its Warranty division and Zegarek advised Ardito that his services were no longer needed (A. 94, 152, 165).

Other employees laid off for lack of work were David Kocivar, Thomas Dodge and Stewart Lilker.

David Kocivar - Management Trainee

The testimony of the Company's witness, the evidence, and the personnel records of the Company all indicate that Kocivar was a management trainee and that his discharge was based upon Kocivar's refusal to continue as a management trainee and was in no way related to his Union adherence. Kocivar made application to the Company for a managerial position in December 1973 (Respondent's Exhibit No. 6). Kocivar was hired February 1974 at a starting salary of $2.00 per hour. As of June 5th, Kocivar's salary had been increased to $3.00 per hour, a 50% increase (A. 61-62).

The Board contends that Kocivar was not a supervisor; however, the uncontradicted testimony of the Company's witness, Morris Zegarek, and even the witnesses produced by the General Counsel confirm and corroborate the supervisory authority with which Kocivar was cloaked (A. 70-71, 73-74, 80, 176). The Administrative Law Judge states "I am satisfied, without going into evidence on the point, that he remained at all times an employee..."(A.30). Nevertheless, the testimony unequivocally indicates that Kocivar possessed the authority to effectively recommend discipline of fellow employees without any independent investigation by management (A. 140-142). Kocivar was responsible

for the Sales Department and each employee in sales was instructed to report and take orders directly from Kocivar. Kocivar also had the right to recommend whether or not the employees in the Sales Department were to be kept or let go (A. 140).

The Company's records also indicate that Kocivar was employed in a managerial position (A. 198) (Respondent's Exhibit No. 2 and 6). The General Counsel cites Precision Fabricators v. N.L.R.B., 204 F.2d 567, 568-569 (C.A. 2, 1953) and N.L.R.B. v. Cousins Associates, Inc., 283 F.2d 242, 243-244 (C.A. 2, 1960) as a basis for the Board's finding that Kocivar was not a supervisor on the grounds that his authority was limited and routine in nature. The evidence on the record, however, indicates that Kocivar did have the authority to assign work and recommend the retention or discharge of other employees without any independent investigation by management (A. 140-141).

In addition to the above, Kocivar handled cash and was permitted to use the register and also made cash deposits in the bank (A. 70, 141).

On Friday, August 30th, Zegarek explained to Kocivar that in order to continue his management training he would have to be sent to Honda schools in town or out of town and further explained that the Company would not have a position for an additional salesman during the winter months. Kocivar told Zegarek that he would like to make the decision overnight. The next day, Saturday, August 31st, Kocivar advised that he did

not want the position nor the responsibility of management. At that point, Zegarek was forced to inform Kocivar that he was laid off (A. 70, 152-153).

Thomas Dodge

Dodge was hired as a salesman on June 1st. On Friday, August 30th, Zegarek informed Dodge that due to the seasonality of the business he was going to have to let him go. Zegarek also said, "Take advantage of the long weekend.", and Dodge admitted that by leaving Friday night he would have Saturday, Sunday, and Monday (Labor Day) off (A. 131-132).

Stewart Lilker

Lilker was hired as an assembler on April 8th and was advised by Zegarek on Friday, August 30th, that he was laid off. Lilker made reference to the Company's agreement with the Union and requested to work Saturday, August 31st, "being that the agreement was that we would work through September 1st" (A. 120).

The Board contends that Lilker was discharged because of Union activities; however, the Union and Lilker were advised of the immediate and impending layoffs and that these layoffs were both expected and accepted by the employees and the Union (A.118) and Lilker himself admitted that he was advised of the imminent layoffs. Lilker now takes the position that everybody who worked in the peak season was guaranteed employment in the slow

season; however, during cross examination Lilker testified as follows:

Q. "And when you talked about layoffs, it didn't dawn on you how could people be laid off if they were guaranteed employment?"

A. "That's correct, it slipped my mind." (A. 125-126).

It should be noted that none of the other affected employees present at the August 28th meeting raised the issue of guaranteed employment at the time they were advised of the immediate and impending layoffs.

It becomes increasingly clear that the affected employees and the Union had knowledge of the cyclical nature of the business and the common practice in the industry to lay off one-third to forty percent of personnel during the slow season (A. 122, 136). The fact that neither the Union nor those employees present made any protest in connection with the Company's layoff policy corroborates and confirms the Company's contention that the affected employees were discharged on the basis of their seniority and the seasonality of the business and not because of any Union activity.

The Board fails to give credence to the uncontradicted testimony for the necessity of seasonal layoffs. In addition thereto, the Administrative Law Judge himself states that he "has difficulty understanding Respondent's Exhibit No. 5 (graph prepared from the Company's books and records showing proportion

of sales to manpower for the year 1971, a typical or average year for the Company). The Administrative Law Judge went on to state that "it obviously proves nothing about 1974" although the testimony of the Company's witness was uncontradicted that the same cycle applied to each of the successive years (A. 24). Once again it must be pointed out that the Board's interpretation of this evidence improperly casts upon the Company a burden to corroborate and permits the General Counsel whose burden it is to prove an unfair labor practice to shift its burden to the Company.

Albert Antonson

Antonson was hired in May as a temporary employee who was to return to school in September (A. 84). When Antonson did not return to work at 9:00 a.m., Thursday, August 29th, along with the other employees who participated in Monday's work stoppage, his supervisor Ted Port, terminated Antonson's employment on the assumption that Antonson had taken his leave (A. 83).

Robert Siegfried

Siegfried was hired in March 1974 as a mechanic. He was scheduled to work six days and two nights each week (A. 100-101). During the last week in July after working approximately four months, Siegfried asked Zegarek for one of the nights off based

upon a family hardship, at which time Zegarek temporarily agreed to Siegfried's request.

During the last week in August, Zegarek advised Siegfried that the slow season begins September 1st. Zegarek also stressed the necessity for mechanics to work at least two nights per week (A. 105-107).

Siegfried repeated that it would be a hardship for him to work nights and asked Zegarek if it would be possible for other employees to work his evening hours. Zegarek replied that in order to avoid a hardship he would allow Siegfried to start at twelve noon on the days he would be working nights. Zegarek repeated that Siegfried must work nights and that it would be unfair to the other employees who had more seniority to work nights in Siegfried's place (A. 105-107). The importance of working nights is corroborated by one of the Board's own witnesses, Stewart Lilker (A. 118).

On Saturday, August 31st, Siegfired informed Zegarek that he could not work any nights at all because of his family problem. At that point Zegarek stated that he had no choice but to discharge Siegfried (A. 104, 149-150).

New Hires

The Administrative Law Judge and the Board erred in their interpretation of the evidence in reference to the Company's hiring of new employees for the purpose of showing animus and

imputing therefrom that the discharged employees had been terminated for Union activities.

The Company hired new employees subsequent to September 1st; however, the evidence indicates that the Board erred in addition when considering replacements in counted heads as opposed to job slots, thereby ignoring turnovers which took place subsequent to September 1st. (A. 154-159).

The uncontradicted testimony of the Company's witness, Morris Zegarek, indicates that two inventory clerks (Brian and Jim) were hired for the purpose of taking inventory at the specific request of the Company's accountants (A. 109, 165).

The Board contends that regular employees in the Parts Department worked on inventory subsequent to the August layoffs on the basis of testimony of one of its witnesses, Ken Ruppel. Ruppel testified that Brian was hired to be in charge of inventory and that subsequently, Brian had an accident and was unable to return to work. Ruppel then testified "So to replace Brian we had a new fellow in his position named Jim." (A. 109).

The Court should note that during cross-examination Ruppel was asked whether or not Jim checked his work and although Ruppel replied "No", that at that point in time Jim had been employed by the Company for only three days (TR 495-496).

The evidence is clear that the Board erred in including the hiring of Mark Trantham as a replacement for Kocivar, a management trainee, and imputing therefrom that employees were

terminated discriminatorily for Union activities. The uncontradicted testimony of both Kocivar and Zegarek indicates that Kocivar had refused to continue in his management training and was terminated for that reason alone (A. 70, 152-153, 156).

The Board further erred in counting the replacement (Jay Wilner) of John Steindel as evidence of the Company's animus. Steindel quit to work for his father and none of the laid-off employees were able to perform his work (A. 163-164).

The General Counsel contends that Lilker should have been offered a position as a mechanic when Steindel quit. Zegarek testified that Lilker was not a "full-fledged" mechanic and was not qualified to replace Steindel (A. 163-164).

The General Counsel's contention that Zegarek did not perceive Lilker to be a "full-fledged" mechanic is not supported by the evidence on the record. Lilker admitted in his letter of application for employment that "... I hadn't had much experience with Hondas and that much with motorcycles in general.", and in view of his lack of experience would be willing to work on a protracted trial period (TR 362, 372, 488).

The Board also erred in counting the hiring of a replacement of Siegfried as a replacement of an employee discriminatorily discharged. In so doing, the Board failed to give credence to the fact that Siegfried was terminated because of his refusal to work the mandatory nights and the requirement of the Company to have these positions filled (A. 150).

The Board still further erred in considering the hiring of John O'Donnell as showing the Company's animus and in failing to give credence to the uncontradicted testimony that this employee was hired specifically into a Veteran's Administration Program for which no other laid-off employee had the requisite eligibility. This job opening was first offered to Stewart Lilker who turned it down (A. 148, 165-166).

The evidence on the record is uncontradicted, and the Court should give credence to the fact that the two part time racing enthusiasts were not hired as a replacement for discriminatees but were in fact hired in an attempt to build up an area of the Company's business. The Administrative Law Judge and the Board erred in assuming that because its witnesses testified that they were never questioned as to whether or not they were racing enthusiasts that the Company did not have knowledge of the same. It is obvious that since the business of the Company is motorcycles, the expertise of its employees, including whether or not they race is a fact known to the Company (A. 162-163).

The Administrative Law Judge failed to give credence to the uncontradicted testimony of Morris Zegarek that layoffs occur each and every year on or about September 1st, and that the normal work force (Unit Employees) during the slow season was between ten and twelve, and that following the layoffs in September 1974 the remaining work force continued to be ten to

twelve except for some temporary and part time additions (A. 57, 118, 136).

The Administrative Law Judge further erred in failing to adopt and accept the understanding reached between the Union and the Company during the August 28th meeting that in the event of layoffs, it would be accomplished by seniority within departments (A. 118) and erred further in assuming that the hiring of personnel as heretofore depicted was a technique employed by the Company to capitalize on this agreement.

The Administrative Law Judge also erred in assuming that the agreement with the Union has no affect upon the Company because the Union had not been recognized (A. 27).

Clearly, any attempt to circumvent that agreement whether or not the Union was recognized, would be a violation of the Act.[4]

In view of the foregoing uncontradicted testimony that such layoffs have occurred each and every year for the past ten years as testified to by the Company's witness, there should be no question that the affected employees were discharged due to the seasonality of the business on the basis of their seniority in accordance with the agreement reached with the Union (A. 57, 136).

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[4] Section 8(a)(5) states that "The duty to bargain covers all matters concerning rates of pay, wages, hours of employment, or other conditions of employment . . . These are called mandatory subjects of bargaining. . .These mandatory subjects of bargaining include but are not limited to such matters as ...seniority... layoffs..." A LAYMAN'S GUIDE TO BASIC LAW UNDER THE NATIONAL LABOR RELATIONS ACT, Page 24, U.S. Government Printing Office, Washington : 1966

The evidence clearly shows that the Union and the affected employees were advised of the immediate and impending layoffs and that these layoffs were expected and accepted (A. 118) and that the affected employees were terminated due to seasonal needs and not because of their Union activities, irrespective of the new hires above mentioned.

II. THE BOARD'S USE OF A BARGAINING ORDER IS NOT THE ONLY AVAILABLE EFFECTIVE REMEDY.

The Union's Majority Status

The General Counsel failed to establish that the Union represented a majority of the unit employees.

At the August 28th meeting the Company presented a list of 23 individuals employed by the Company. Zegarek contended that Musano's name be added to the list. This request was accepted by the Board. The Company and the Union agreed that six individuals did not belong in the unit. The Board properly excluded Antonson because he was only a temporary summer employee, and further excluded William (Skip) Dowling and an employee identified only as Richie due to the fact that they were also temporary workers whose employment was to cease at the beginning of the school year. The Board, therefore, concluded that the unit consisted of 16 employees.

Of these 16 the Board found that the Union held valid authorization cards from 9 of the 16 unit employees.

As set forth (supra), it is the Company's contention that Kocivar is not an employee within the meaning of the Act and that his authorization card should not be counted. It is uncontradicted that the Union did not establish its alleged majority until the evening of September 3rd, the date that Baldasarra signed his authorization card (A. 49-50), the ninth card accepted and counted by the Board.

It is the Company's position that each of the affected employees was discharged for cause and seasonal needs of the business and not because of any Union activity. The Board contends that the Union established a majority of 9 of the 16 Unit employees. Therefore, it follows that if the Court finds that if even 1 of the 6 laid-off employees was lawfully discharged, then the Union would not have established a majority and the Board's findings should be reversed and this proceeding dismissed.

The burden of proof for an unfair labor practice is upon the charging party. (Aaron Brothers, 158 N.L.R.B. 10717, 62 L.R.R.M. 1160 (1966). The error which lies in this case is that the Administrative Law Judge cast upon the Company a burden to corroborate and permitted General Counsel, whose burden it is to prove the unfair labor practice, to shift its burden to the Company to produce evidence which would have been cumulative because of the lack of contradiction in the testimony of the Company's witness.

The Company has more than met its burden to come forward and rebut any evidence that may have given rise to an inference of an unfair labor practice. The law is well settled that in the absence of a majority, a Gissel-type bargaining order is inappropriate (A. 7).(infra. Page 27).

For the Court to find a majority, the General Counsel must meet its burden of proof in connection with each and every one of the 6 alleged discharged employees (Section 8(a)(3)). The Company need only show that one of the discharges was lawful, for in that event, the Union would only have valid authorizations from 8 of the 16 Unit employees, and the Union would lose its alleged majority. Therefore, it follows that the Company need only show that one of the layoffs prior to September 3rd was lawful.

In addition to the above, the Company's acts could not have been "pervasive" or "outrageous" for the Union contends to have established a majority the evening of September 3rd, which is subsequent in time to the Company's alleged commencement of its 8(a)(3) behavior of August 23rd, the date of Musano's discharge. The evidence is clear that the Company's behavior did not interfere with the Union's organizational activities, for it is obvious that the Union was able to continue its organizational campaign and allegedly establish a majority by September 3rd.

In this case, no 8(a)(5) violation has been proven or found. In Gissel, supra, not only was a majority found but in

addition thereto, each of the employers refused in bad faith to bargain with the Union. (N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575, 471 L.R.R.M. 2482 (1969)).

It is appropriate to note at this time, the Board's own warnings as stated in Levi Strauss, 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338, 1341, and n.7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to insure employee free choice.

In N.L.R.B. v. Gissel Packing Co., supra, 395 U.S. 575, the Supreme Court sustained the Board's issuance of a bargaining order. However, in Gissel, the Court found that the Employer had violated Section 8(a)(5) by unlawfully refusing to bargain with the Union. In addition to Gissel, the Board cites Joseph J. Lachniet, d/b/a Honda of Haslett, 201 N.L.R.B. 855, 856 (1973) as a basis for the issuance of its bargaining order. The Court should note that in the aforementioned matter that the Board itself concluded that "Respondent's refusal to bargain should be found violative of Section 8(a)(5) and (1) of the Act and a bargaining order should issue." Joseph J. Lachinet, supra. In the instant case it should be emphasized that there has been no allegation proof or finding of a Section 8(a)(5) violation by the Company. In addition to the foregoing, the Company avers that the Union never established a majority and that a bargaining order is not the only available effective remedy.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court make and enter its decree dismissing this proceeding.

GUTTERMAN & POLLACK,
BY: Stewart Altman
Attorneys for Respondent
71 So. Central Avenue
Valley Stream, New York 11580
Tel. No. 516-561-0430

March, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 75-4186
TWO WHEEL CORP., d/b/a HONDA OF MINEOLA, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Respondent's Offset brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

John S. Irving,
General Counsel,
Att: William F. Wachter, Esquire
Michael D. Stein, Esquire
National Labor Relations Board
Washington, D.C. 20570

/S/ Stewart Altman
Gutterman & Pollack
BY: Stewart Altman
Attorneys for Respondent
Office and P.O. Address
71 South Central Avenue
Valley Stream, New York
Tel: 516-561-0430

Dated at Valley Stream, N.Y.

this 2ND day of March 1976.